



**DEPARTMENT of AGRICULTURE
and NATURAL RESOURCES**

JOE FOSS BUILDING
523 E. CAPITOL AVE
PIERRE SD 57501-3182
danr.sd.gov

February 14, 2023

NOTICE OF ENTRY OF ORDER

TO: Ann Mines Bailey, Assistant Attorney General (Counsel for Chief Engineer)
1320 East Highway 14, Suite 1
Pierre SD 57501-8501

Matthew E. Naasz, Legal Counsel for Tomas and Eraclio Martinez
P.O. Box 8045
Rapid City SD 57709

J. Scott James, Legal Counsel for Applicant
South Hills Law PLLC
429 ½ Mt. Rushmore Rd
Custer SD 57730

Susan Anderson (Limited Appearance)
Elk Mountain Water Users Assn. Inc.
PO Box 6062
Custer SD 57730

Robert J. Galbraith, Legal Counsel for Daniel and Dalton Stearns
Nooney & Solay, LLP
PO Box 8030
Rapid City SD 57709-8030

Petitioners
(see attached list dated November 9, 2022)

FROM: Ron Duvall, Water Rights Permitting Administrator
SD DANR, Water Rights Program

SUBJECT: Order Granting the Motion to Dismiss Martinez Late-Filed Petition regarding Water Permit Application No. 2850-2, Elk Mountain Water Users Association Inc.

Enclosed is an Order granting the Motion to Dismiss the Martinez Late-Filed Petition regarding Water Permit Application No. 2850-2, Elk Mountain Water Users Association Inc.

As stated in the enclosed order, the petitioner may appeal the order by filing an appeal with DANR by March 6, 2023, before 5:00 pm Central time. Such appeal must be in writing and sent via U.S. Mail.

Mail appeal to:

Atten: Ron Duvall
SD DANR, Water Rights Program
523 E Capitol Ave
Pierre SD 57501

Questions regarding this matter may be directed to Ron Duvall, Water Rights Program at (605) 773-3352 or ron.duvall@state.sd.us.

Enclosure

c: David McVey, Assistant Attorney General (Legal Counsel for Water Management Board)

Petitioner List

Water Permit Application No. 2850-2, Elk Mountain Water Users Association Inc.
November 9, 2022

PETITIONERS

Daniel Norman Stearns
25499 Dewey Rd
Edgemont SD 57735

Dalton Stearns
10321 Two Track Trl
Edgemont SD 57735

Travis Paulton
10693 Pass Creek Rd
Edgemont SD 57735

William and Susan Paulton
10666 Pass Creek Rd
Edgemont SD 57735

Jim and Charel Pitts
25385 Gillette Canyon Rd
Newcastle WY 82701

Late-Filed Petitioner

Tomas & Eraclio Martinez
25663 Dewey Rd
Edgemont SD 57735

RECEIVED

FEB 14 2023

OFFICE OF
WATER

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	ORDER GRANTING MOTION
APPLICATION NO. 2850-2, Elk)	TO DISMISS
Mountain Water Users Association,)	
Inc.)	

On July 7, 2022, the applicant filed an application requesting an appropriation of 145 acre-feet of water per year at a maximum diversion rate of 0.333 cubic feet per second. The application was reviewed, and the Chief Engineer issued a recommendation of approval in this matter with qualifications. Notice of the Chief Engineer's recommendation was appropriately noticed in the legal newspaper and on DANR's website as required. The notice set forth that petitions by interested persons must be filed on or before October 11, 2022. On October 28, 2022, Water Rights received the petition in opposition of Tomas and Eraclio Martinez (Martinez Petition) which was postmarked October 25, 2022.

Notice was published in the Rapid City Journal and the Custer County Chronicle on September 28, 2022. The notice specifically set forth the deadline of October 11, 2022, for the filing of petitions. The Martinez petition, however, was received more than two weeks after that deadline.

On the on January 24, 2023, the Water Rights Program filed a motion to dismiss on the basis that the petition filed by Tomas and Eraclio Martinez was not timely in that it was not filed within 10 days of the published notice as

required by both statute and rule. On February 3, 2023 a response to the motion to dismiss was filed by Tomas and Eraclio Martinez. On February 13, 2023, a hearing was held by the Pre-Hearing Chair for the Water Management Board.

SDCL §46-2A-4(c) states in relevant part:

...The notice, which shall be provided by the chief engineer to the applicable newspapers, shall include the following, as applicable:...

4. A statement that a person may only participate in the hearing if:...

(c) The person files a petition to oppose the application with the chief engineer and applicant within ten days of the published notice;

ARSD §74-02-01-12.04 states:

Petitions filed pursuant to SDCL 46-2A-4(4) or 46-2A-23 to oppose or support an application must be served by first class mail or personally delivered to the chief engineer's office and the applicant. Mail must be postmarked or personal delivery must occur at least 10 days before the published date of hearing pursuant to SDCL 46-2A-4 or within 10 days after the published notice pursuant to SDCL 46-2A-23. If the tenth day is a Saturday, Sunday, or legal holiday, petitions must be postmarked or personally delivered to the chief engineer's office and the applicant by the next working day.

Both the statute and the administrative rule use mandatory language for the requirement that any petitions in opposition be filed withing ten days of the published notice. Neither the statute nor the rule contains a "good cause" exception to the ten-day requirement. Both the statute and the rule are mandatory and in the case the Board, by and through the pre-hearing chair, is bound to grant the motion to dismiss.

FOR THE REASONS SET FORTH HEREIN, Water Right's Motion to Dismiss the Petition in Opposition filed by Tomas and Eraclio Martinez is **GRANTED**. Tomas and Eraclio Martinez may appeal this Order by filing with

the DANR by March 6, 2023 before 5:00 P.M. Central Time. Such appeal must be in writing and sent via U.S. Mail.

So Ordered this 13th day of February, 2023.

A handwritten signature in purple ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

Rodney Freeman
Pre-Hearing Chairman
Water Management Board

CERTIFICATION

The undersigned hereby certifies under the penalty of perjury that a true and correct copy of a Notice of Entry of Order dated February 14, 2023, regarding the granting of a motion to dismiss a late-filed petition for Water Permit Application No. 2850-2 – Elk Mountain Water Users Association Inc. and the Order Granting Motion to Dismiss signed February 13, 2023, was served upon the following by enclosing the same in an envelope with first class postage prepaid and affixed thereto, and depositing said envelope in the United States mail on February 14, 2023.

Matthew E. Naasz
P.O. Box 8045
Rapid City SD 57709

J. Scott James
South Hills Law PLLC
429 ½ Mt. Rushmore Rd
Custer SD 57730

Susan Anderson
Elk Mountain Water Users Assn. Inc.
PO Box 6062
Custer SD 57730

Robert J. Galbraith
Nooney & Solay, LLP
PO Box 8030
Rapid City SD 57709-8030

Petitioners as follows:

Daniel Norman Stearns
25499 Dewey Rd
Edgemont SD 57735

Dalton Stearns
10321 Two Track Trl
Edgemont SD 57735

Travis Paulton
10693 Pass Creek Rd
Edgemont SD 57735

William and Susan Paulton
10666 Pass Creek Rd
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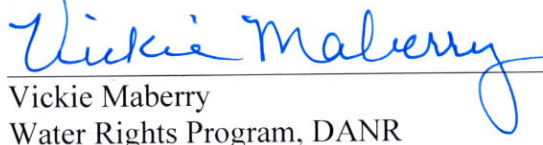
Jim and Charel Pitts
25385 Gillette Canyon Rd
Newcastle WY 82701

Late-Filed Petitioner
Tomas & Eraclio Martinez
25663 Dewey Rd
Edgemont SD 57735

Above also Sent Inter-office to:

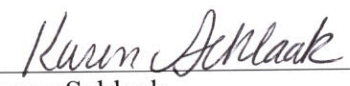
Ann Mines Bailey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501

David McVey, Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501


Vickie Maberry
Water Rights Program, DANR

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF HUGHES)

Sworn to, before me, this 14th day of February, 2023.


Karen Schlaak
Notary Public
My Commission expires April 1, 2025

